Supreme Court, U.S.
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No. 09-1487 JUN 3 - 2010

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In The

Supreme Court of the United States

ROBERT O'CONOR, JR.,

Petitioner,

vs.

THE FROST NATIONAL BANK,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Constitutional right to privacy issue:

1) Does the intentional disclosure to the general public of a citizen's entire social security number, name and address constitute a violation of a citizen's guaranteed right to privacy under the United States Constitution, the statutory protections under the SOCIAL SECURITY ACT, 42 U.S.C. §§ 405, 408, and public policy against such public disclosures because of the prevalence of identity theft reported by federal agencies?

Interpretation of federal statutes issues:

2) Do the provisions of the SOCIAL SECURITY ACT, 42 U.S.C. §§ 405, 408 pre-empt Texas state law and apply to respondent, a federally-insured national bank?

3) Does the Constitution and common law of the United States and the State of Texas provide for a private civil action for invasion of the right of privacy?

4) Does federal pre-emption apply to the TEX. BUS. & COMM. CODE § 501.001 exception for "court records," which allows for the disclosure of entire social security numbers in civil court filings, according to the Texas courts?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff and appellant below):

ROBERT O'CONOR, JR.

Represented by Robert O'Conor, Jr., Esq., ROBERT O'CONOR, JR. – LAWYER, P. O. Box 460187, Houston, Texas 77056-8187

Respondents (defendants and appellees below):

THE FROST NATIONAL BANK

Represented by Michael J. Smith and L. David Smith, Chernosky, Smith, Ressling & Smith, P.L.L.C., 4646 Wild Indigo, Suite 110, Houston, Texas 77027

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CITATIONS FOR OPINIONS BELOW

The opinion of the Court of Appeals for the First District of Texas (App. 1) is not reported as it is a Memorandum Opinion.

The order of the Supreme Court of Texas denying the petition for review (App. 3) was not reported other than on a summary disposition table.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals for the First District of Texas issued its opinion on October 8, 2009. The Supreme Court of Texas denied the Petition for Review on March, 2010. This Court has jurisdiction under 28 U.S.C. § 1257 to review on writ of certiorari the decisions by the Texas courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. XIV, § 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The applicable provisions in the U.S. Code are set out in the Appendix at App. 25-30.

42 U.S.C. § 405(c)(2)(C)(i), (ii), (iii), (iv)

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42 U.S.C. § 405(c)(2)(E)

42 U.S.C. § 408(a)(8)

STATEMENT OF THE CASE

Petitioner signed a Promissory Note in favor of the respondent dated May 23, 2006, with a maturity of May 22, 2007. The petitioner's social security number appeared prominently next to petitioner's name on the face of the note, as required by respondent

under applicable banking regulations. (C.R.[1] 6-8; 19-21). The respondent filed the underlying suit on March 29, 2007, before the due date of the note. (C.R. 2-8). This note was attached as an exhibit twice: 1) to the respondent's Original Petition and 2) to its Motion for Summary Judgment, which the respondent filed on July 3, 2007, *without redacting* Petitioner's social security number in either filing. (C.R. 6-8; 19-21; C.R. 11-30). Petitioner filed his response to respondent's motion for summary judgment on July 23, 2007; respondent filed its reply with an Affidavit and Loan Agreement with petitioner's name, address and entire social security number unredacted. (C.R. 35-45; 53). It remains *undisputed* that respondent filed documents with petitioner's complete social security number adjacent to his name in *three* separate pleadings, which were placed into the public domain as court filings: 1) its Original Petition; 2) its Plaintiff's Motion for Summary Judgment; and 3) its Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment on petitioner's counterclaim for unconstitutional invasion of privacy because of respondent's public disclosure of his full social security number. (C.R. 6-8; 19-21; C.R. 11-30; C.R. 53). The respondent presented no controverting facts to the petitioner's Affidavits presented to the trial court, but instead defended on the inapplicability of the SOCIAL SECURITY ACT mandates to its

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[1] The initials "C.R." refer to the "Clerk's Record" pages, which include the filings in the Texas trial court.

filings with regard to the publication of petitioner's social security number in "court filings" and the propriety of those filings under Texas law, relying on a ruling in its favor "as a matter of law."

On December 31, 2007 the trial court granted the respondent's summary judgment motion on petitioner's invasion of privacy counterclaim and also denied Petitioner's cross-motion for summary judgment on his counterclaim. (App. 3; C.R. 340, 342). At that point in the case, the only matter pending decision by the trial court was as to the attorney's fees; the parties entered into a stipulation on that issue on January 14, 2008. (C.R. 343-344). Shortly thereafter, on January 16, 2008, the trial court signed its Final Judgment. (C.R. 347-350). Petitioner filed his Motion for New Trial on January 24, 2008 and also attached eight exhibits, together with a Verification of those exhibits in support of his motion. (C.R. 351-478). The respondent filed its Response on March 13, 2007, *without attachments*. (C.R. 479-481). Petitioner's Motion for New Trial was never ruled upon by the trial court and the motion was overruled by operation of law; petitioner perfected his appeal to the Texas court of appeals.

The courts below disregarded the Affidavits which were submitted in support of petitioner's summary judgment on his invasion of privacy counterclaim and looked solely to respondent's interpretation of the law in denying relief to petitioner and granting respondent's summary judgment. The issues presented herein were decided strictly as points of law by

Texas courts interpreting and applying federal statutes necessarily implicated because petitioner's counterclaim involved *the* personal federal identifier, his social security number. The Court of Appeals for the First District of Texas affirmed the trial court's denial of petitioner's counterclaim on invasion of privacy on October 8, 2009 and denied petitioner's Motion for Rehearing on November 19, 2009. (App. 1). On March 5, 2010, the Supreme Court of Texas denied petitioner's Petition for Review of the trial and appellate courts' interpretation of controlling federal law. (App. 3). This appeal followed.

REASONS FOR GRANTING CERTIORARI

Prevalence of Identity Theft:

The federal agency charged with tracking the status of consumer protection throughout the United States, the Federal Trade Commission, noted in its February 2010 Data Book Report that "identity theft was the number one complaint category in the CSN [Consumer Sentinel Network] for calendar year 2009 with 21% of the overall complaints."[2] An independent survey noted that 11.1 million adults were victims of identity theft in 2009 with the total amount of

[2] Available at http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2009.pdf (last checked May 22, 2010), p. 3.

identity fraud involving about $54 billion.[3] The U.S. Department of Justice Report "Identity Theft – A Research Review" published in July 2007 states: "[i]dentity theft has become perhaps the defining crime of the information age, with an estimated 9 million or more incidents each year."[4] This crime affects millions of citizens each year because of the misuse of the federal statute assigned and required personal identifier for all Americans – their social security number, to which is linked a mine full of very personal information.

Identity Theft from Court Filings:

The advent of the "paperless" filing of documents in federal and state courts has led to the fact that most identity thefts arise from court filings.[5] A few key strokes will place court filings on the screen for the recipient to review, with easy access to social security numbers in those court filings – the issue presented herein. As various federal agencies have noted, access to social security numbers, together

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[3] Javelin 2010 Identity Theft Report, available at http://www.spendonlife.com/blog/2010-identity-theft-statistics (last checked May 22, 2010), p. 1; *see also* http://www.gao.gov/products/GAO-09-759T (July 17, 2009) (last checked May 22, 2010) (yearly identity theft losses exceed $50 billion).

[4] Available at http://www.ojp.usdoj.gov/nij/publications/id-theft (last checked May 22, 2010), p. 1.

[5] *See* http://www.gao.gov/products/GAO-08-1009R (September 19, 2008) (last checked May 22, 2010) (availability of court records in bulk).

with the citizen's name and address, opens the door to numerous types of associated identity fraud, now affecting millions yearly and resulting in billions of dollars in costs. Such a breach was *intentionally* done by respondent – a federally-insured national bank – in its state civil court filings against the petitioner, no less than three times, with the "blessing" of the Texas state courts, despite federal statutes, regulations and criminal sanctions against such blatant disclosure of petitioner's federal personal identifier, to include as petitioner herein suggests, a violation of "the right of the people to be secure in their persons, houses, papers, and effects" recognized by the Founding Fathers and this Court as a fundamental right.

Texas Courts' Misinterpretation of Federal Laws Is Harmful Precedent:

It is of considerable public knowledge and concern that there are many suits being filed by banks against citizen borrowers. If the citizens have no right to stop the bank from publishing their social security number to the general public, as occurred herein, then identity theft will continue to flourish because of the ease with which this crime happens from court filings. The federal courts' concern with this issue led to mandatory redaction and prohibition of personal identifier information in federal filings. This is in accord with the SOCIAL SECURITY ACT, 42 U.S.C. § 408.8 and attendant regulations, but which has been ignored or misinterpreted by the Texas courts in this case. In this case the Texas courts held that Texas

national banks are not covered by the SOCIAL SECURITY ACT and are therefore not under its mandates with regard to the confidentiality of citizen social security numbers. Further, the Texas courts held that Texas state law trumps admittedly pre-emptive federal statutes. The federal criminal sanction is beyond the control of the ordinary citizen, but the Court should recognize the fundamental right to privacy in personal information and thereby provide Americans with the protection and guarantees of not only what the applicable federal statutes and regulations provide, but also what is inherent in the privacy rights "penumbra" in the Bill of Rights. It is clearly evident that – if this petition is not granted despite the authority of the Court to protect the integrity of the American judicial system – the interpretation given by the Texas courts to the U.S. CONSTITUTION and the SOCIAL SECURITY ACT will provide a fully open door for significant breaches by not only respondent, but other banks and financial institutions into the future, with precedent flowing to other states and literally millions of Americans.

1. RESPONDENT'S INTENTIONAL PUBLIC DISCLOSURES OF PETITIONER'S ENTIRE PERSONAL FEDERAL IDENTIFIER CONSTITUTES A VIOLATION OF HIS CONSTITUTIONAL RIGHT TO PRIVACY, STATUTORY MANDATES OF PROTECTION UNDER THE SOCIAL SECURITY ACT, AND PUBLIC POLICY INHERENT IN THOSE STATUTES

The Founding Fathers were prescient in the Fourth Amendment wording "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" when the internet and cybercrime were outside the sphere of the possible. In 1961, the Court referred to the prediction of James Madison in 1789:

> "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."
>
> In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Cong. 439 (1789). . . .

Less than 30 years after *Boyd*, this Court, in *Weeks v. United States*, 232 U.S. 383 (1914), stated that

> "the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."

Mapp v. Ohio, 367 U.S. 643, 647 (1961) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886); *Weeks v. United States*, 232 U.S. 383, 391-92 (1914). Along this same theme of right of personal security, the Court reviewed the privacy rights guaranteed to all citizens and noted in *Roe v. Wade* that although the Constitution does not specifically refer to a right of privacy,

> [i]n a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.

Roe v. Wade, 410 U.S. 113, 152 (1973). Earlier, the Court had traced various rights that derived from specific Amendments and explained:

> specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . [v]arious guarantees create zones of privacy.

Griswold v. Connecticut, 381 U.S. 479, 484 (1965). *Roe v. Wade* presented the Court with another opportunity to discuss and clarify the tension between individual liberty interests embodied in the Bill of Rights (specifically the First, Fourth, Fifth and Ninth Amendments) and the power of the states to enact laws that control the personal activities of residents and included the citation to the following in *Palko*:

> In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (cited in *Roe v. Wade*, 410 U.S. at 152). Petitioner respectfully presents issues related to the delicate balance between federal guarantees of personal security and liberty and state government actions that restrict that freedom: in this case the actions of the Texas state courts to allow respondent national bank to breach petitioner's right to personal security by the

public dissemination of his federal personal identifier in state court filings, albeit in violation of federal law, and without any civil right of redress for respondent's deliberate disregard of petitioner's constitutional rights.

In a very real sense, the tension between a citizen's right to privacy in "their persons, houses, papers and effects" (Fourth Amendment) and the federal government's administration of "ordered liberty" to ensure equal protection of laws to all citizens through mandatory assignment of a federal personal identifier, which is also used by state governments, began with the enactment in 1935 of what is now known as the SOCIAL SECURITY ACT. Even the name of that statute involves fundamental personal liberty protection: "social security." The assignment of a unique personal federal identifier is a logical and necessary means to ensure equal and adequate enforcement of a significant number of laws, not the least of which are the benefits of American citizenship flowing through the Social Security programs federally and through state administration. The Act states:

> . . . the Commissioner of Social Security shall take affirmative measures to assure that social security account numbers will, to the maximum extent practicable, be assigned to all members or groups or categories of individuals by assigning such numbers (or ascertaining that such numbers have already been assigned) . . .

42 U.S.C. § 405(c)(2)(B)(i). At birth, each and every American is given his "number," which follows him/her to his death. The Social Security Administration website notes the following caveats:

> Identity theft is one of the fastest growing crimes in America. A dishonest person who has your Social Security number can use it to get other personal information about you. Identity thieves can use your number and your good credit to apply for more credit in your name. Then, they use the credit cards and do not pay the bills. You may not find out that someone is using your number until you are turned down for credit or you begin to get calls from unknown creditors demanding payment for items you never bought. . . .
>
> If someone has misused your Social Security number or other personal information to create credit or other problems for you, Social Security cannot resolve these problems. . . .
>
> If you have done all you can to fix the problems resulting from misuse of your Social Security number and someone still is using your number, we may assign you a new number . . .
>
> Keep in mind that a new number probably will not solve all your problems. This is because other governmental agencies (such as the Internal Revenue Service and state motor vehicle agencies) and private businesses (such as banks and credit reporting companies) likely will have records under your old

> number. Also, because credit reporting companies use the number, along with other personal information, to identify your credit record, using a new number will not guarantee you a fresh start. This is especially true if your other personal information, such as your name and address, remains the same. . . .
>
> For some victims of identity theft, a new number actually creates new problems. If the old credit information is not associated with the new number, the absence of any credit history under the new number may make it more difficult for you to get credit.[6]

The agency that assigns the personal federal number identifier publicly admits that a change in this number is entirely discretionary and once misused, reparation for the harm is close to impossible.

The reality of harm arising from improper disclosure of this federal identifier has resulted in significant efforts by Congress and the federal government to protect the use and disclosure of citizen social security numbers through clear mandatory language in controlling statute and regulations. These concerns led the Fifth Circuit to review the background, including the U.S. Supreme Court opinions, for refusing disclosure of SSNs in a 2001 case involving a FOIA request for SSNs from the Army:

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[6] Available at http://www.ssa.gov/pubs/10064.html (last checked May 22, 2010).

> '[W]hether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made.' Instead, the court must consider only whether the requested information sheds light on agency action. This benefit should flow directly from disclosure, as 'mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy.'

Sherman v. U.S. Dept. of Army, 244 F.3d 357, 362 (5th Cir. 2001) (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 1480 (1989); *United States v. Ray*, 502 U.S. 164, 179, 112 S.Ct. 541 (1991)) (internal citations omitted). The *Sherman* court further stated:

> . . . Nevertheless, we recognize that individual citizens have a substantial informational privacy right to limit the disclosure of their SSNs, and consequently reduce the risk that they will be affected by various identity fraud crimes.

Id. at 366. The Fifth Circuit clearly recognized the virtual mother lode of personal information that could be mined through social security numbers and that such information should be granted a privacy right.

Despite the plethora of controlling authority cited in the courts below by the petitioner, this Court's precedent, the clear intent and language of preemptive federal statutes and regulations, the mandates of filings in the federal courts throughout the

country, and the reality of statistics on identity theft that constitutes violation of the "right of the people to be secure in their persons, houses, papers, and effect," the Texas courts ignored those rights in affirming the respondent national bank's intentional general public disclosure of petitioner's private federal identifier as proper under Texas law in civil court filings. The rulings of the Texas courts in this case should be reviewed by the Court because this precedent is capable not only of violating the fundamental rights of millions of citizens in Texas, but also citizens throughout America whose banking transactions are the subject of state civil court filings.

2. THE PROVISIONS OF THE SOCIAL SECURITY ACT, 42 U.S.C. §§ 405, 408 PREEMPT TEXAS LAW AND APPLY TO RESPONDENT, A NATIONAL BANK

Respondent national bank consistently based its arguments against petitioner's invasion of privacy claims on the supposition that it is, somehow, exempt from the requirements of following the prohibitions stated in the SOCIAL SECURITY ACT because it is not an "authorized person" under Section 405. The Texas court of appeals ignored established rules of statutory construction and agreed with respondent, stating that:

> We conclude that O'Conor's argument that Frost is liable to him because it committed a federal felony as defined in the Social Security Act by disclosing his SSN fails.

> First, O'Conor has provided no evidence that Frost is an 'authorized person' forbidden by section 405(c)(2)(C)(viii) of the Social Security Act to disclose any social security account number or related record. . . . An 'authorized person' is an 'officer or employee the United States and states and an officer or employee of any state, political subdivision of a state, or agency of a state or political subdivision of a state, and *any other person or persons (or officer or employee thereof) who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990.* . . . Because Frost is not an officer or employee of the United States or any state, agency of a state, or political subdivision of a state, O'Conor has not shown and cannot show as a matter of law that 405(c)(2)(C)(viii) applies to any action of Frost.

See First Court of Appeals Opinion, pp. 12-13; App. 1 attached hereto (emphasis added). This holding construing the non-applicability of the SOCIAL SECURITY ACT to respondent national bank, who is clearly included in the cited section as it had possession of petitioner's social security number because of federal banking statutes and regulations, should be reviewed because it runs counter to controlling authority. The Texas Supreme Court denied review of this federal statute interpretation by the First Court of Appeals of Texas, *despite* its long-standing approval of the holding that state courts' interpretation of federal

statutes "should be governed by the federal courts' construction of the statute and regulation." *Olson v. Holmes,* 571 S.W.2d 211 (Tex. Civ. App. – Austin 1978), writ ref'd n.r.e. *per curiam*, 587 S.W.2d 678 (Tex. 1979).

The statute which petitioner contends imposes a duty on respondent to not disclose his social security number to the public and thus invade his constitutional right to privacy is a *federal* statute: 42 U.S.C. §§ 405, 408. The respondent national bank violated that duty in three intentional and deliberate filings in state court. Further, because the federal statute is the sole authority over the assignment, purposes and uses of the federal social security number identifier, such authority impliedly pre-empts any state actions that conflict with 42 U.S.C. §§ 405, 408. *Gade v. Nat'l Solid Waste Mgmt. Ass'n,* 505 U.S. 88, 98-99, 112 S.Ct. 2374, ___ (1992). The Court has held that federal statute construction relies on the "Rules of Construction" section at the very first section of the federal statutory codes. *United States v. A & P Trucking Co.*, 358 U.S. 121, 123 (1958). In *A & P Trucking*, the Defendant trucking entities argued that the word "whoever" in the criminal statute meant "person" and could not possibly include an "entity." *Id.* at 122. The Court cited directly to 1 U.S.C. § 1, which states:

> 1 U.S.C. § 1. Words Denoting Number, Gender, and so Forth.

> In determining the meaning of any Act of Congress, unless the context indicates otherwise –
>
> words importing the singular include and apply to several persons, parties, or things;
>
> words importing the plural include the singular;
>
> words importing the masculine gender include the feminine as well;
>
> words used in the present tense include the future as well as the present;
>
> . . .
>
> the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;
>
> "officer" includes any person authorized by law to perform the duties of the office;
>
> . . .

1 U.S.C. § 1. Using this statute as a guide, the Court interpreted a federal criminal statute with wording similar to the one at issue herein:

> 18 U.S.C. § 835 provides that 'whoever knowingly violates any such regulation [ICC regulations pertaining to the safe transport of dangerous articles] shall be fined not more than $1,000 or imprisoned not more than one year, or both; . . . ' The section makes such

> regulations binding on 'all common carriers' engaged in interstate commerce. And 1 U.S.C. § 1, part of a chapter entitled 'Rules of Construction' and in light of which § 835 must be read, provides that 'in determining the meaning of any Act of Congress, unless the context indicates otherwise – . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, *partnerships*, societies, and joint stock companies, as well as individuals; . . . (Italics supplied.) The word 'whoever' in 18 U.S.C. § 835 must, therefore, be construed to include partnerships 'unless the context indicates otherwise.'
>
> We think that partnerships as entities may be proceeded against under both § 322(a) and § 835. The purpose of both statutes is clear: to ensure compliance by motor carriers, among others, with safety and other requirements laid down by the Interstate Commerce Commission in the exercise of its statutory duty to regulate the operations of interstate carriers for hire. In the effectuation of this policy it certainly makes no difference whether the carrier which commits the infraction is organized as a corporation, a joint stock company, a partnership, or an individual proprietorship. The mischief is the same, and we think Congress intended to make the consequences of infraction the same.

A & P Trucking, 358 U.S. at 123-24. The Court has made construction of the word "whoever" in federal

statutes very clear – it is meant to have global impact, including a federal banking corporation, such as the respondent national bank.

In this case, the statute section relied on by the Texas court of appeals clearly includes the global-inclusive wording: "any other person or persons (or officer or employee thereof) who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990." *See* 42 U.S.C. § 405(c)(2)(C)(viii). In addition, in section 408, the word "Whoever" is set apart from the entirety of the prohibited acts, thereby conveying the legislative intent to globally cover any of the possible violators, including corporate entities:

> 42 U.S.C. § 408. Penalties.
>
> (a) In general,
>
> Whoever –
>
> . . .
>
> (8) discloses, uses, or compels the disclosure of the social security number of any person in violation of the laws of the United States; shall be guilty of a felony and upon conviction thereof shall be fined under Title 18 or imprisoned for not more than five years, or both.
>
> . . .

42 U.S.C. § 408(a)(8). The A & P Trucking entity was not able to get around the penalty under interstate trucking statutes and respondent national bank

should not be able to get around the penalty under impermissible public disclosure of petitioner's social security number, thereby violating petitioner's right to privacy. Respondent national bank has *not* contested that it placed this protected identifier as part of the court records and has not contested the fact that such court records are electronically accessible to the general public. The very actions prohibited by the federal statute have been admitted by the respondent national bank and condoned by the Texas courts in this case. The Court should review this erroneous construction of the federal statutes by the Texas courts in this case which effectively exonerates national banks in Texas for violations of their duties and responsibilities under those statutes, leaving such entities free to violate citizens' constitutional guarantees of privacy and security.

3. THERE IS A PRIVATE CIVIL ACTION FOR INVASION OF THE RIGHT OF PRIVACY UNDER THE CONSTITUTION AND COMMON LAW OF THE UNITED STATES AND THE STATE OF TEXAS

In direct contrast to the holdings by the Court that: "[i]n a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution" and "specific guarantees in the Bill of Rights have penumbras, formed by emanations from

those guarantees that help give them life and substance . . . [v]arious guarantees create zones of privacy" the Texas First Court of Appeals erroneously held that petitioner had somehow waived his constitutional arguments and forfeited his constitutional claims. *See Roe*, 410 U.S. at 152; *Griswold*, 381 U.S. at 484; pages 10-11, *supra.* The Texas court held: "O'Conor's respose [sic] to Frost's no-evidence motion for summary judgment did not reassert any arguments under the United States Constitution," and further posited that under its reading of *Sherman*, somehow the "disclosure in *Sherman* is distinguishable from the disclosure here. O'Conor voluntarily gave his SSN to Frost in the course of their financial dealings," and that such statutorily-mandated action by the petitioner as part of the loan processing deemed to be "voluntary," somehow effected a relinquishment by petitioner regarding his constitutionally-protected privacy rights and afforded respondent absolute liberty to violate such rights. *See* First Court of Appeals Opinion, p. 6 fn4, p. 21, App. 1 hereto.

This reasoning by the Texas court clearly ignores the "informational privacy interest" referred to in *Sherman* cited *supra,* and also the continuous re-assertions by petitioner that respondent had violated his constitutional right to privacy. The petitioner clearly included this protected right in nine pleadings filed in the trial court: 1) the Defendant's[7] First

[7] Petitioner was the defendant in the Texas trial court.

Amended Answer, ¶ 7, p. 3; 2) in Defendant's Response to Plaintiff's Motion for Summary Judgment, ¶ 17, p. 8; 3) in Defendant's Second Amended Original Answer, ¶ 7, p. 3-4; 4) in Defendant's Cross-Motion for Partial Summary Judgment as to Plaintiff's Liability on Defendant's Invasion of Privacy Counterclaim, ¶ 9, p. 38; 5) in Robert O'Conor, Jr.'s Affidavit, p. 2; 6) in Bernard A. Ash's Affidavit, pp. 6-7; 7) in Defendant's Sur-Reply to Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment, ¶ 15-16, pp. 10-11; 8) in Frost Bank's Traditional and No-Evidence Motion for Summary Judgment on Defendant's Counter-Plaintiff's Counterclaim, attached in Exhibits of the Defendant's First Amended Answer and Defendant's Second Amended Answer, Exhs. 1 and 2; and 9) Defendant's Response to Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaim, ¶ 10, pp. 5-6 (specifically referencing Defendant's Second Amended Answer, ¶ 7, pp. 3-4); ¶ 17, p. 12, and Affidavit, p. 2. *See* C.R. 33; 42; 80-81; 91; 94; 101-102; 129-130; 173; 180; 266-267; 273; 282. All of these nine pleadings with specific references to petitioner's constitutionally-protected right of privacy run directly counter to the alleged "waiver" found by the Texas court, which is without support in the record. This error of fact was included in petitioner's Motion for Rehearing filed in the First Court of Appeals at pages 6-7.

The Texas courts' reasoning that "O'Conor *voluntarily* gave his SSN to Frost in the course of their financial dealings" is patently incorrect. *See* First

Court of Appeals Opinion, p. 21, App. 1 hereto (emphasis added). In fact, respondent national bank was under a statutory mandate to verify the identity of the individual involved in the financial transaction, the petitioner herein. *See* 31 U.S.C. § 53.18 (Banking). That section was strengthened with the amendments under what is commonly referred to as the PATRIOT ACT OF 2001. *See* Public Law 107-56 of 2001, 107th Congress, § 326. Petitioner was required to give his social security number if there were to be a loan transaction. The "voluntary" disclosure premise on which the Texas courts relied has no basis in fact and therefore cannot provide any support for their holdings. Respondent never contended that petitioner gave respondent permission to publicly disclose his entire social security number next to his name and address. The First Court of Appeals also included, as a rationale to support wholesale disclosure of social security numbers:

> . . . Rather the case law O'Conor relies on supports the argument that the provisions of SSNs in personal loan transactions, as in bankruptcy filings, may be warranted by the government's strong public interest in preventing bank fraud and facilitating the banking process.

See First Court of Appeals Opinion, p. 21, App. 1 hereto. There was no allegation of fraud by either petitioner or respondent in their pleadings. Further, bankruptcy filings require redaction of social security numbers. FED. R. BANKR. P. 9037. It is clear that the

intent and mandates in the SOCIAL SECURITY ACT for protection of petitioner's personal identifier was not within the sights of the Texas courts. It is also clear that the Texas courts are unfamiliar with the redaction of personal identifiers that is *mandatory* in federal court filings. *See* FED. R. CIV. P. 5.2, FED. R. CRIM. P. 49.1, FED. R. BANKR. P. 9037.

In addition, the Texas courts' holding in this case runs counter not only to the protected privacy interests which underlie the policy considerations for the federal and state court orders on redaction of SSNs, but also runs directly counter to the holdings of the Court over a large span of time, which have protected the right to privacy as a "fundamental" right:

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." An effective waiver of a fundamental constitutional right requires an "intentional relinquishment or abandonment of a known right or privilege."

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938).

> As the Court noted, "[A] most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable."

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 155 (1989) (quoting *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974)).

> Broad dissemination by state officials of such information [medical drug records], however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155-156 (1973).

Whalen v. Roe, 429 U.S. 589, 606 (1977) (J. Brennan, concurring).

> More recent decisions have established that the right to marry is part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause.

Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

> [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.
>
> > "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their

> beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Stanley v. Georgia, 394 U.S. 557, 564 (1969). In fact, the long history of cases reviewed by the Court against waiver of fundamental constitutional rights has been recognized by the very same Texas court of appeals issuing the Opinion in this case:

> A citizen may not be deprived of due process of law. U.S. CONST. amend. XIV, §1. Rather, a citizen may be deprived of a constitutional right only by his own knowing waiver of that right. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 132 (Tex. 2004) (quoting *Brady v. U.S.*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.")).

Bermea v. Texas, 265 S.W.3d 34, 41 (Tex. App. [1st] 2008). The holding that petitioner somehow "waived" his constitutional rights is contradicted by the numerous re-assertions of petitioner's protected privacy right in his personal identifier identified in the Record on Appeal *supra* and cannot support the Texas

courts' holding in this case, particularly in view of the strong precedent against such a holding – of waiver of fundamental constitutional rights, including the right of privacy. There are several clear facts in this case: 1) petitioner provided his social security number to respondent national bank as required by law and did not thereby give permission for its dissemination by the respondent to the general public; 2) respondent obtained petitioner's social security number under statutory mandates, which also included the limited parameters for its use and disclosure; 3) the proper uses of social security numbers are pre-emptively controlled by the federal statutes that provide for its assignment to the citizens; 4) state laws that abridge or enlarge the permissible uses or misuses of social security numbers are of no effect; 5) the legitimate governmental interest in assignment of social security numbers is counterbalanced by statutory protections against their misuse because of the importance of the right to privacy and personal liberties embodied in the Bill of Rights; and 6) violations of the constitutional rights of citizens to privacy constitute an actionable civil wrong for the citizens so affected. The holding by the Texas courts in this case that petitioner does not have a cause of action against respondent should be granted review by the Court.

4. FEDERAL PRE-EMPTION APPLIES TO THE TEX. BUS. & COMM. CODE § 501.001 EXCEPTION FOR "COURT RECORDS" WHICH THE TEXAS COURTS HAVE MISINTERPRETED TO ALLOW PUBLIC DISCLOSURE OF ENTIRE SOCIAL SECURITY NUMBERS IN CIVIL COURT FILINGS

The Texas First Court of Appeals held that petitioner: "has failed to present any evidence that these [respondent's three] filings were not 'court records' and therefore exempt from the provisions of section 501.001(a) [TEXAS BUSINESS AND COMMERCE CODE]" and "the sections of the SOCIAL SECURITY ACT that O'Conor relies on do not apply to his claims," effectively holding that the TEXAS BUSINESS AND COMMERCE CODE trumps the mandates in the SOCIAL SECURITY ACT with regard to the use of Social Security numbers. *See* First Court of Appeals Opinion, p. 15, p. 15 fn6; App. 1 hereto. The Texas court again clarified its interpretation of the SOCIAL SECURITY ACT:

> as we have already stated, section 405(c) of the Social Security Act applies to the use of SSNs by state governments and their political subdivisions and agencies, and O'Conor failed to present any evidence that those sections apply to Frost as a private entity.

Id. In addition, the Texas courts relied on an "exception" under the TEXAS BUSINESS AND COMMERCE CODE:

> (e) This section does not apply to:
>
> . . .

(4) a court record; or

. . .

TEX. BUS. & COMM. CODE § 501.001(c)(4). The court of appeals held: "O'Conor has failed to present any evidence that these filings were not "court records" and therefore exempt from the provisions of section 501.001(a)," despite petitioner's arguments that the Texas statute was pre-empted by the SOCIAL SECURITY ACT. *See* First Court of Appeals Opinion, p. 15, fn6; App. 1 hereto. The Texas courts have clearly stated that the SOCIAL SECURITY ACT does not pre-empt the TEXAS BUSINESS AND COMMERCE CODE section 501.001 with regard to use and disclosure of social security numbers in court filings by private entities, such as respondent national bank.

This holding by the Texas courts in this case is in error and runs afoul of specific provisions in the SOCIAL SECURITY ACT. Social security numbers have significant protections regarding their lawful use by the states, which are narrowly limited and defined by the statute to include six areas: 1) tax, 2) general public assistance, 3) driver's license or motor vehicle registration laws, but *without disclosure* on any state identification documents, 4) birth certificates *without disclosure* on such certificates, 5) FOOD STAMP ACT administration, and 6) FEDERAL CROP INSURANCE ACT. 42 U.S.C. § 405(c)(2)(C)(i), (ii), (iii), (iv); 42 U.S.C. § 405(c)(2)(C)(vi). There are only two other "additional purposes" for which states are allowed access to social security numbers: 1) identification of

duplicate names for jury selection purposes, and 2) identification of convicted felons on jury lists. 42 U.S.C. § 405(c)(2)(E)(ii)(I), (II). In addition, the confidentiality of that identifier is clearly stated as *absolute* and the "Penalties" for use and/or disclosure outside of the statutory limitations, by *anyone* are significant:

> Social security account numbers and related records that are obtained or maintained by authorized persons [access by statute] pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.

42 U.S.C. § 405(c)(2)(C)(viii). Petitioner respectfully submits that this statute controls respondent's use of his social security number and pre-empts the Texas statute that the Texas courts relied on for the holdings on this issue in the case.

In addition, the State of Texas recognizes the confidentiality and the need for protection from disclosure of social security numbers. It also recognizes that the use of the federal identifier is limited to *governmental agencies*, and for specific purposes, and therefore has restricted the commercial access and use, including respondent's use, to that identifier. The TEXAS BUSINESS & COMMERCE CODE includes the following among its "Miscellaneous" provisions:

> (a) A person, *other than* government or a governmental subdivision or agency, may not:
>
> > (1) intentionally communicate or otherwise make available to the general public an individual's social security number; . . .

TEX. BUS. & COMM. CODE § 501.001(a) (emphasis added).[8] Respondent cannot presume to argue that it is a "government" or a "governmental subdivision or agency," or that its disclosure of the petitioner's social security number was intended for any purpose listed in either the federal or state statute regarding its use, including the "court records" section of this statute, since respondent's use lies outside the federally-restricted "juror list" uses. Therefore, petitioner respectfully submits that respondent's disclosure also violated the Texas statutory provision regarding its disclosure in its filings against the petitioner.

Petitioner notes that the re-codified statute to which the Texas court of appeal cited, includes the following provision:

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[8] Petitioner cited to TEX. BUS. & COMM. CODE § 35.58 which was in effect at the time the action was filed in 2007. It was recodified in 2009, but the relevant wording remained exactly the same.

§ 521.002

(a) In this chapter:

(1) "Personal identifying information" means information that alone or in conjunction with other information identifies an individual, including an individual's:

(A) name, social security number, date of birth, or government-issued identification number;

(B) mother's maiden name;

(C) unique biometric data, including the individual's fingerprint, voice print, and retina or iris image;

(D) unique electronic identification number, address, or routing code; and

(E) telecommunication access device as defined by Section 32.51, Penal Code.

(2) "Sensitive personal information" means, subject to Subsection (b), an individual's first name or first initial and last name in combination with any one or more of the following items, if the name and the items are not encrypted:

(A) social security number;

(B) driver's license number or government-issued identification number; or

(C) account number or credit or debit card number in combination with any required security code, access code, or password that

> would permit access to an individual's financial account.
>
> (3) "Victim" means a person whose identifying information is used by an unauthorized person.
>
> (b) For purposes of this chapter, the term "sensitive personal information" does not include publicly available information that is lawfully made available to the public from the federal government or a state or local government.

TEX. BUS. & COMM. CODE § 521.002 (IDENTITY THEFT PROTECTION AND ENFORCEMENT ACT) (effective April 1, 2009). It is evident that under the Texas statute upon which the Texas courts supported their holdings, the actions of the respondent national bank were violations of that statute. This is because the respondent included what is defined as "sensitive personal information" in that statute: the petitioner's first and last name, together with his entire social security information and financial account number, all of which were not "lawfully made available to the public" by either the federal government or a state or local government. The exception for "court records" in the Texas statute is pre-empted by the SOCIAL SECURITY ACT.

Respondent's actions in public dissemination of petitioner's "sensitive personal information" were deliberate, unreasonable and completely unnecessary to the claims it had against the petitioner. The respondent's actions are an intentional and unwarranted

invasion into the petitioner's right of personal privacy, which is protected by statute, and such intrusion by the respondent is very objectionable to any reasonable person. Petitioner established respondent's liability as a matter of law in his motion for summary judgment based on respondent's invasion of petitioner's privacy counterclaim. Therefore, the Texas courts' holding in this case, based on their interpretation that the Texas statute allowed respondent national bank's public dissemination of petitioner's protected federal identifier in state court filings, is in error and should be granted review by the Court. If review is denied, this precedent will inevitably lead other national banks in Texas and elsewhere to rely on an "open door" policy to public dissemination of social security numbers in state court filings, thereby resulting in harm to literally millions of citizens.

CONCLUSION

It is clear that the federal government has a legitimate interest in the administration of "ordered liberty" to ensure equal protection of laws to all citizens, one aspect of which is the assignment of a social security number to all citizens. The Court has consistently held inviolable the rights guaranteed in the Bill of Rights, following James Madison's exhortation that "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *See Mapp v. Ohio,*

367 U.S. 643, 647 (1961) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)). The holdings by the Texas courts in this case have not only thwarted the basic pre-emptive tenets of the SOCIAL SECURITY ACT, but have also pulled down the barricades of protection of social security numbers against public disclosure by respondent, a national bank – a direct assault on "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" under the Fourth Amendment. The precedent set by the Texas courts' holdings in this case will cause irreparable harm to the rights of citizens, in Texas and elsewhere in the country. As Founding Father James Madison stated – "it is the duty of the courts to be watchful" and this strongly supports the Court's review of this case.

PRAYER

Wherefore, premises considered, petitioner prays that the Court GRANT his petition, issuing a writ of certiorari for the Court's review of this case.

Respectfully submitted,

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Opinion issued October 8, 2009

[SEAL]

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00229-CV

ROBERT O'CONOR, JR., Appellant

V.

FROST NATIONAL BANK, Appellee

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 2007-19797

MEMORANDUM OPINION

Appellant, Robert O'Conor, Jr., filed an invasion of privacy counterclaim against Frost National Bank ("Frost") for the disclosure of his Social Security Number ("SSN") on financial documents filed as part of Frost's pleadings in its claim against O'Conor for failure to pay under a promissory note. O'Conor appeals from the trial court's order granting Frost's traditional and no-evidence motion for summary judgment and denying his cross-motion for summary judgment on his counterclaim. In four issues, O'Conor

argues that the trial court erred: (1) in granting Frost's motion for summary judgment because Frost based its motion on financial privacy arguments as opposed to the personal privacy claim filed by O'Conor; (2) in granting Frost's summary judgment motion and denying O'Conor's cross-motion because O'Conor provided evidence on all elements of his claims and met his burden of proving that Frost's disclosure carried a criminal sanction; (3) in granting Frost's summary judgment motion and denying his cross-motion because public policy supports O'Conor's counter-claim; and (4) in granting Frost's summary judgment motion and denying O'Conor's cross-motion because personal privacy is a right protected by the United States and Texas Constitutions.

We affirm.

Background

On May 23, 2006, O'Conor executed a promissory note in favor of Frost. O'Conor's name, address, and full SSN appeared together on the face of this note. O'Conor also signed a Notice of Final Agreement that contained his name, address, and full SSN. On March 29, 2007, Frost filed suit against O'Conor alleging that he had failed to pay the indebtedness in accordance with the terms of the promissory note and that Frost had exercised its right to accelerate payment of the promissory note. Frost's petition requested that the trial court award it the principal sum plus accrued interest, late fees, pre- and

post-judgment interest, and attorney's fees. Frost attached a copy of the promissory note containing O'Conor's name and SSN to its original petition without redacting his SSN.

On July 3, 2007, Frost filed its motion for summary judgment on its claim against O'Conor for failing to pay the indebtedness under the promissory note. Frost again attached a copy of the promissory note containing O'Conor's name and SSN without redacting his SSN. O'Conor filed a response to this motion for summary judgment on July 23, 2007. In its response to O'Conor's reply, Frost attached the Notice of Final Agreement document containing O'Conor's name and full SSN.

On October 2, 2007, O'Conor filed his Second Amended Answer to Frost's claims on the promissory note, asserting a counterclaim for invasion of privacy. In his counterclaim, O'Conor asserted

> invasion of privacy claims against [Frost] for its publication of [his] private and statutorily protected federal identification, which is highly offensive to a reasonable person, is not of legitimate public concern, to [his] injury and damages by disclosure of protected private information in violation of law. [Frost's] public dissemination of Defendant's social security information in its pleadings [is] a criminal violation of the Social Security Act[, specifically, 42 U.S.C. § 408] and a violation of the [Texas Business and Commerce Code] § 35.58, which allow such

> disclosure only under specific statutory authority or under a court order of proper jurisdictional authority. [Frost's] actions in disclosing [O'Conor's] statutorily protected information are a violation of law, as such was done without either the required legal authority or [O'Conor's] consent, and in further violation of [O'Conor's] privacy rights under the U.S. Constitution.

Also on October 2, 2007, O'Conor filed a cross-motion for summary judgment on his invasion of privacy counterclaim. O'Conor cited provisions of the Social Security Act[1] and former section 35.58 of the Texas Business and Commerce Code,[2] and he also argued that his right to privacy in his SSN was protected by the United States Constitution. O'Conor also made arguments based on the elements of common law invasion of privacy. Attached to his motion for summary judgment on his invasion of privacy claims, O'Conor submitted his own sworn affidavit and that of Bernard A. Ash, whom O'Conor had designated as an expert witness. On December 10, 2007, Frost filed its response to O'Conor's cross-motion for summary judgment on his invasion of privacy claims and its written objections to O'Conor's and Ash's affidavits.

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[1] 42 U.S.C. §§ 301-1397mm (West 2003 & Supp. 2009).

[2] Section 35.58 of the Texas Business and Commerce Code has been recodified, and those provision can now be found in sections 501.001 and 501.002 of the Texas Business and Commerce Code.

On October 17, 2007, in an interlocutory order, the trial court granted Frost's motion for summary judgment against O'Conor on Frost's claims under the promissory note,[3] leaving pending in the trial court only O'Conor's counterclaim against Frost and a dispute regarding attorney's fees.

On November 19, 2007, Frost filed a no-evidence and traditional motion for summary judgment on O'Conor's invasion of privacy counterclaim, arguing that O'Conor's claims under the Social Security Act, the Texas Business and Commerce Code, the Untied [sic] States' [sic] Constitution, and the common law should be dismissed for failure to provide any evidence of essential elements and on various traditional grounds. Frost also argued that O'Conor's claims were not supported by the Financial Privacy Act or the Federal Privacy Act of 1974, although O'Conor did not plead or argue these statutes as part of his counterclaim. O'Conor filed his response to Frost's summary judgment motion on December 10, 2007. O'Conor argued that the Federal Privacy Act and Federal Financial Privacy Act were not part of his invasion of privacy counterclaim. O'Conor also reasserted his right to recovery under the Social

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[3] O'Conor does not challenge this ruling on appeal.

Security Act, the Texas Business and Commerce Code, and the common law.[4]

On December 31, 2007, the trial court signed an interlocutory order denying O'Conor's cross-motion for summary judgment on his invasion of privacy claims. The trial court signed a second interlocutory order granting Frost's motion for summary judgment on O'Conor's invasion of privacy counterclaim and ordering that O'Conor "take nothing on his Counterclaim asserted in this case." The trial court signed its final judgment on January 16, 2008, again ordering that O'Conor take nothing on his counterclaim and awarding Frost damages under the promissory note, accrued interest, fees, pre- and post-judgment interest, costs of court, and attorney's fees. O'Conor's appeal of the denial of his motion for summary judgment on his invasion of privacy claim and of the trial court's grant of Frost's motion for summary judgment on those claims followed.

Standard of Review

We review a trial court's grant of summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). When a party moves for both a traditional and a no-evidence summary judgment, we first review the trial court's

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[4] O'Conor's respose to Frost's no-evidence motion for summary judgment did not reassert any arguments under the United States Constitution.

summary judgment under the no-evidence standard of Texas Rule of Civil Procedure 166a(i). *Ford Motor Co. v. Ridgway,* 135 S.W.3d 598, 600 (Tex. 2004). If the no-evidence summary judgment was properly granted, we do not reach arguments under the traditional motion for summary judgment. *Id.*

To prevail on a no-evidence motion for summary judgment, the movant must establish that there is no evidence to support an essential element of the non-movant's claim. TEX. R. CIV. P. 166a(i); *see Flameout Design & Fabrication, Inc. v. Pennzoil Caspain Corp.,* 994 S.W.2d 830, 834 (Tex. App. – Houston [1st Dist.] 1999, no pet.). The burden then shifts to the non-movant to present evidence raising a genuine issue of material fact as to the elements specified in the motion *Mack Trucks, Inc. v. Tamez,* 206 S.W.3d 572, 582 (Tex. 2006). "The trial court must grant the motion unless the non-movant produces more than a scintilla of evidence raising a genuine issue of material fact on the challenged elements." *Flameout Design & Fabrication,* 994 S.W.2d at 834. If the evidence brought forward by the non-movant does no more than create mere surmise or suspicion of a fact, less than a scintilla exists. *Forbes, Inc. v. Granada Bioscis., Inc.,* 124 S.W.3d 167, 172 (Tex. 2003).

To prevail on a traditional summary judgment motion, the movant has the burden of proving that it is entitled to judgment as a matter of law and that there are no genuine issues of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth,* 900 S.W.2d 339, 341 (Tex. 1995). When both parties move for summary

judgment and the trial court grants one motion and denies the other, the reviewing court should review the summary judgment evidence presented by both sides, determine all questions presented and render the judgment that the trial court should have rendered. *Tex. Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 648 (Tex. 2004).

I. Frost's Entitlement to Summary Judgment on Statutory and Common Law Invasion of Privacy

In his second issue, O'Conor argues that Frost was not entitled to summary judgment on his invasion of privacy claims under the federal Social Security Act, former section 35.58 of the Texas Business and Commerce Code, or the common law. He argues that he was entitled to summary judgment on all of these claims because he proved their elements as a matter of law.

A. The Social Security Act Claim

In the first part of his second issue, O'Conor contends that his appeal of the trial court's rulings on the motions for summary judgment was "based on the illegal and unauthorized disclosure of [his] social security number, which is regulated under several controlling federal statutes, including the Social Security Act." O'Conor argues that sections 405 and 408 of the Social Security Act are "impliedly pre-emptive" and include "mandatory statutory

language." O'Conor contends that the Social Security Act "specifically identified and limited" usage of SSNs by the states to administer tax, general public assistance, driver's license or motor vehicle registration laws, birth certificates, and Food Stamp Act and Federal Crop Insurance Act programs. *See* 42 U.S.C.A. §§ 405(c)(2)(C) (West Supp. 2009) (outlining purposes for which state governments and their subdivisions may use SSNs). He argues that there are only "two other 'additional purposes' for which states are allowed access to SSNs: 1) identification of duplicate names for jury selection purposes, and 2) identification of convicted felons on jury lists." *See* 42 U.S.C.A. §§ 405(c)(2)(E)(ii)(I), (II) (West Supp. 2009) (describing additional purposes for which state or any political subdivision may use SSNs).

O'Conor relies on section 405(c)(2)(C)(viii) of the Social Security Act to support his claim that Frost violated "a very clear prohibition that the statutory disclosure limitations are mandatory and absolute." Section 405(c)(2)(C)(viii) provides:

> (I) Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.
>
> . . . .

> (III) For purposes of this clause, the term "authorized person" means an officer or employee of the United States, an officer or employee of any State, political subdivision of a State, or agency of a State or political subdivision of a State, and any other person (or officer or employee thereof), who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990. . . .

42 U.S.C.A. § 405(c)(2)(C)(viii)(I), (III) (West Supp. 2009).

O'Conor argues that Frost violated section 405(c)(2)(C)(viii) of the Social Security Act by using his SSN for a different purpose than permitted by the statute and therefore committed a federal felony under section 408(a)(8) of the Social Security Act, which states:

> In general, whoever . . . discloses, uses, or compels the disclosure of the social security number of any person in violation of the laws of the United States . . . shall be guilty of a felony and upon conviction thereof shall be fined under Title 18 or imprisoned for not more than five years, or both.

42 U.S.C.A. § 408(a)(8).[5] Frost responds that the provisions of the Social Security Act cited by O'Conor

[5] O'Conor also makes references to an opinion of the Texas Attorney General recognizing that "disclosure of a SSN in violation of federal law is a felony." Op. Tex. Att'y Gen. No. GA-0519 (2007). O'Conor argues that the attorney general opinion explains the prerequisites for private entites' [sic] disclosure of SSNs – the adoption of a privacy policy and maintenance of the confidentiality and security of a SSN disclosed to the person. *See* TEX. BUS. & COM. CODE ANN. § 501.052 (Vernon 2009) (stating person cannot require individual to disclose SSN unless person has adopted privacy policy and met other conditions). O'Conor asserts that Frost has blatantly violated this section.

O'Conor also cites amendments to the Texas Public Information Act governing the use of SSNs by governmental bodies. O'Conor contends that "the Texas Legislature amended the Texas Public Information Act to protect those acting for a 'governmental body, including by a district or county clerk,' from criminal and/or civil liability for social security numbers in government records." O'Conor further "notes that the amended statute retained the exception from public disclosure of social security numbers under the Open Records Act and also included recognition of the federal preemption presented herein in the amendment to the Property Code to eliminate the publication of social security numbers in property records." *See* TEX. GOV'T CODE ANN. § 552.147(a) (Vernon Supp. 2008) (regarding public information and SSNs: "The social security number of a living person is excepted from the [requirement that public information be available to the public during normal business hours of the governmental body], but is not confidential under this section and this section does not make the social security number of a living person confidential under another provision of this chapter or other law."); TEX. PROP. CODE ANN. § 11.008(i) (Vernon Supp. 2008) (regarding "Personal Information in Real Property Records;" "To the extent that federal law conflicts with this section, an instrument must contain the information required by and must be filed in a manner that complies with federal law.").

(Continued on following page)

regulate the use of SSNs by states and political subdivisions and agencies of the states, not by banks, and are inapplicable in this case. *See* 42 U.S.C.A. § 405(c)(2)(C).

We conclude that O'Conor's argument that Frost is liable to him because it committed a federal felony as defined in the Social Security Act by disclosing his SSN fails. First, O'Conor has provided no evidence that Frost is an "authorized person" forbidden by section 405(c)(2)(C)(viii) of the Social Security Act to disclose any social security account number or related record. *See* 42 U.S.C.A. § 405(c)(2)(C)(viii). An "authorized person" is "an officer or employee of the United States, an officer or employee of any State, political subdivision of a State, or agency of a State or political subdivision of a State, and any other person (or officer or employee thereof), who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990." 42 U.S.C.A. § 405(c)(2)(C)(viii)(III). Because Frost is not an officer or employee of the United States or of any state, agency of a state, or political subdivision of a state, O'Conor has not

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However, O'Conor did not refer to any of these theories for recovery in his pleading or in his arguments before the trial court. We will not consider them for the first time on appeal. *See Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) ("As a rule, a claim . . . must have been asserted in the trial court in order to be raised on appeal."); *see also* TEX. R. CIV. P. 301 (judgment shall conform to the pleadings).

shown, and cannot show as a matter of law, that section 405(c)(2)(C)(viii) applies to any action of Frost.

Second, there is no private right of action under section 408(a)(8) of the Social Security Act. *See Alexander v. Wash. Gas Light Co.*, 481 F. Supp.2d 16, 33 (D.D.C. 2006) ("42 U.S.C. § 408(a)(8) . . . does not provide a basis for a private civil cause of action."); *Edge v. Prof'l Claims Bureau, Inc.*, 64 F. Supp.2d 115, 118 (E.D.N.Y. 1999) ("42 U.S.C. § 408(a)(8) . . . is a criminal statute which provides for no civil remedies."); *see also Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 1149 (1973) (holding that private citizens lack judicially cognizable interest in criminal prosecution of another).

We conclude, therefore, that the trial court did not err in denying O'Conor's motion for summary judgment and granting Frost's motion for summary judgment on O'Conor's claims under the Social Security Act. *See* TEX. R. CIV. P. 166a(i) (stating movant in no evidence motion for summary judgment must establish that "there is no evidence of one or more essential elements of a claim"); *Flameout Design & Fabrication*, 994 S.W.2d at 834.

We overrule O'Conor's second issue as it relates to his claims under sections 405(c)(2)(C)(viii) and 408(a)(8) of the Social Security Act. Because these issues are dispositive of O'Conor's claims under the Social Security Act, we need not address his other arguments related to that Act. *See Ford Motor Co.*, 135 S.W.3d at 600 (holding that we do not reach

arguments under traditional summary judgment motion if no-evidence summary judgment was properly granted); *F.M. Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000) (holding that reviewing court must affirm summary judgment if any of summary judgment grounds is meritorious).

B. The Texas Business and Commerce Code Claim

In the second part of his second issue, O'Conor claims that Frost violated former section 35.58 of the Texas Business and Commerce Code. As part of the state's continuing statutory revision program, designed to revise the general and permanent statutory law without substantive change, section 35.58 was repealed effective April 1, 2009 and replaced with sections 501.001 and 501.002. Act of May 15, 2007, 80th Leg., R.S., ch. 885, § 2.47(a)(1), 2007 Tex. Gen. Laws 2082 (current version at TEX. BUS. & COM. CODE ANN. § 501.001-501.002 (Vernon 2009)). Former section 35.58(a)(1), like current section 501.001, provided, "A person, other than a government or a governmental subdivision or agency, may not . . . intentionally communicate or otherwise make available to the general public an individual's social security number." Act of June 1, 2003, 78th Leg., R.S., ch. 1326, § 6, 2003 Tex. Gen. Laws 5008 (current version at TEX. BUS. & COM. CODE ANN. § 501.001(a)). As both parties point out, this section also included an exception for "court records." *See id.* (current version at TEX. BUS. & COM. CODE ANN.

§ 501.001(e)(4)) ("This section does not apply to . . . court records. . . .").

O'Conor claims that Frost violated section 501.001(a) of the Business and Commerce Code by attaching documents including his name, address, and full SSN to pleadings and filings submitted to the trial court on three separate occasions. However, O'Conor has failed to present any evidence that these filings were not "court records" and therefore exempt from the provisions of section 501.001(a).[6]

O'Conor cites section 405 of the Social Security Act and argues that "the 'court records' exception must necessarily be construed under the federal statute under which there are two 'additional uses' for states regarding social security numbers that relate to 'courts,' [both having] to do with integrity of the jury selection process." However, as we have already stated, section 405(c) of the Social Security Act applies to the use of SSNs by state governments and their political subdivisions and agencies, and O'Conor failed to present any evidence that those sections apply to Frost as a private entity.[7]

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[6] O'Conor argues that the Social Security Act preempts any state statutes providing for a different use of SSNs. As we have already discussed, the sections of the Social Security Act that O'Conor relies on do not apply to his claims.

[7] O'Conor also argues that the federal Judicial Conference Committee's recommendations on privacy issues provided a basis for the trial court to grant his motion for summary judgment on invasion of privacy grounds and to deny Frost's

(Continued on following page)

We conclude that the trial court did not err in denying O'Conor's motion for summary judgment and granting Frost's motion for summary judgment on O'Conor's claims under former section 35.58 of the Business and Commerce Code.

We overrule O'Conor's second issue as it relates to his claims under former section 35.58 of the Business and Commerce Code.

C. Common Law Invasion of Privacy

In the third part of his second issue, O'Conor argues that the trial court erred in denying his motion for summary judgment and granting Frost's motion for summary judgment because he provided evidence on each element of his common law invasion of privacy counterclaim.

A common law right to privacy exists under Texas law. *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973). To succeed on an invasion of privacy claim, a plaintiff must show an intentional intrusion, physically or otherwise, upon the solitude, seclusion, or private affairs of another, which would be highly offensive to an reasonable person. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993). Additionally, courts have required that the intrusion be

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motion. However, O'Conor has presented no evidence or authority that judicial recommendations support a judgment against Frost.

unreasonable, unjustified, or unwarranted. *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 253 (Tex. App. – Houston [1st Dist.] 1993, writ denied) (citing *Billings*, 489 S.W.2d at 860). This type of invasion of privacy is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying. *Vaughn v. Drennon*, 202 S.W.3d 308, 320 (Tex. App. – Tyler 2006, pet. denied); *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 6 (Tex. App. – Corpus Christi 1991, no writ).

O'Conor has failed to provide any evidence that Frost intentionally intruded into his privacy in the way typically associated with this tort. Neither party disputes that O'Conor voluntarily provided Frost with his personal information in the course of their financial dealings. Furthermore, Frost used the personal information provided by O'Conor to enforce its rights under the promissory note. This act cannot be considered unreasonable, unjustified, or unwarranted. *See Farrington*, 865 S.W.2d at 253.

We conclude that the trial court did not err in denying O'Conor's motion for summary judgment and granting Frost's motion for summary judgment on this claim.

We overrule the remainder of O'Conor's second issue.[8]

II. Public Policy

In his third issue, O'Conor argues that public policy supports his invasion of privacy claim against Frost. Specifically, O'Conor argues that the affidavit of Bernard A. Ash, his designated expert witness, and two congressional hearing reports by the Government Accounting Office (GAO) provide a public policy basis for supporting his invasion of privacy claim against Frost.

In his affidavit, Ash states that three of Frost's filings "have attached [O'Conor's] name, address, and social security number, which is a violation of both state and federal laws." Ash also states,

> In my experience in law enforcement and security planning the knowledge of a person's correct name and attendant social security number expedites access to other

[8] O'Conor also argues that the publication of his SSN was not necessary or relevant to Frost's claims on the promissory note. We construe this as an argument that his entire SSN was not necessary and could have been redacted. O'Conor waived this argument by not pursuing such a remedy in the trial court by requesting that the court record be sealed or that the filings be redacted or providing the trial court some other kind of notice of the specific grounds of his complaint. *See* TEX. R. APP. P. 33.1 (requiring timely request, objection, or motion stating grounds for ruling complaining party is seeking in order to preserve error for appellate review).

> personal information, which is used in locating and tracking particular individuals and their assets. The Social Security Administration has strict control of the assigned numbers, which follow a person for his lifetime.

Ash provides various websites offered through the Social Security Administration providing information regarding the general confidentiality of SSNs and social security records.

Assuming without deciding that Ash's affidavit is competent summary judgment evidence,[9] it does not provide any evidence that Frost can be held liable to O'Conor under any theories pled in the counterclaim. Furthermore, GAO reports do not provide an independent right to recovery for disclosure of an SSN in court filings. As we have already discussed, the specific statutory and common law bases that O'Conor has cited do not afford him a right to recover in this case.

We overrule O'Conor's third issue.

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[9] Frost objected to Ash's affidavit in the trial court, but the trial court never ruled on its objections. Because we determine that Ash's affidavit does not contain any evidence in support of O'Conor's claim, we do not address Frost's arguments on its admissibility.

III. Constitutional Protection of Privacy

In his fourth issue, O'Conor argues that the United States Constitution protects the privacy of SSNs. O'Conor cites *Sherman v. United States Deptartment of Army,* to support his contention. 244 F.3d 357, 362 (5th Cir. 2001).

Sherman involved an action to compel the Army to disclose documents under the Freedom of Information Act ("FOIA") relating to service awards, including SSNs of service personnel. The Fifth Circuit held that only the "individual whose informational privacy interests are protected . . . can effect a waiver of those privacy interests when they are threatened by an FOIA request" and that such a waiver had not occurred. *Id.* The Fifth Circuit addressed concerns about identity theft:

> [W]e are comfortable measuring the scope of the privacy interest in a SSN in terms of the dire consequences of identity theft and other forms of fraud which are associated with SSN disclosure. That said, we also believe that "[t]o weigh properly the privacy interest involved, the dire consequences of identity theft must be discounted by the probability of its occurrence." [*In re Crawford,* 194 F.3d 954, 959 (9th Cir. 1999)]. Thus, the relatively low risk of identity theft may sufficiently diminish the privacy interest in SSNs to warrant their disclosure where a strong public interest in disclosure exists. *See id.* (holding requirement that individuals filing for bankruptcy submit their social security

> numbers with bankruptcy application is warranted by government's strong public interest in preventing bankruptcy fraud and facilitating transparent bankruptcy process). Nevertheless, we recognize that individual citizens have a substantial informational privacy right to limit the disclosure of their SSNs, and consequently reduce the risk that they will be affected by various identity fraud crimes.

Id. at 365-66.

The requested disclosure in *Sherman* is distinguishable from the disclosure here. O'Conor voluntarily gave his SSN to Frost in the course of their financial dealings, and Frost used that number to collect the debt incurred by O'Conor. O'Conor has not cited any case law or other authority supporting a cause of action like the counterclaim he pled against Frost. Rather, the case law O'Conor relies on supports the argument that the provisions of SSNs in personal loan transactions, as in bankruptcy filings, may be warranted by the government's strong public interest in preventing bank fraud and facilitating the banking process.[10]

We overrule O'Conor's fourth issue.

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[10] We emphasize that O'Conor could have moved to have his social security number redacted or the pleadings sealed if he was concerned about identity theft, but he did neither.

IV. Financial Privacy

In his first issue, O'Conor argues that the trial court erred in granting Frost's summary judgment motion based on federal financial privacy laws and the Federal Privacy Act of 1974 because O'Conor alleged no such grounds in his counterclaim. Because other meritorious grounds support the trial court's take-nothing judgment on O'Conor's invasion of privacy counterclaim, we do not need to address this argument. *See F.M. Props. Operating Co.*, 22 S.W.3d at 872 (holding that reviewing court must affirm summary judgment if any of summary judgment grounds is meritorious).

We conclude that the trial court did not err in rendering a take-nothing judgment against O'Conor on his invasion of privacy counterclaim.

We overrule O'Conor's first issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Alcala, and Hanks.

Cause No. 2007-19797

THE FROST NATIONAL BANK Plaintiff, v. ROBERT O'CONOR, JR. Defendant	§ § § § § § § §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 234TH JUDICIAL DISTRICT

ORDER

(Filed Oct. 2, 2007)

The Court hereby GRANTS *DENIES* the Defendant's Cross-Motion for Partial Summary Judgment as to Plaintiff's liability on Defendant's invasion of privacy counterclaim.

SIGNED this *31st* day of *December*, 2007.

/s/ Reece Rondon
The HONORABLE
REECE RONDON,
District Judge Presiding

[SEAL]

THE SUPREME COURT OF TEXAS

Orders Pronounced March 5, 2010

* * *

ORDERS ON PETITIONS FOR REVIEW

THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

* * *

09-1082 ROBERT O'CONOR, JR. v. THE FROST NATIONAL BANK; from Harris County; 1st district (01-08-00229-CV, ___ SW3d ___, 10-08-09)

* * *

42 U.S.C. § 405(c)(2)(C)(i), (ii), (iii), (iv):

(C)(i) It is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction, utilize the social security account numbers issued by the Commissioner of Social Security for the purpose of establishing the identification of individuals affected by such law, . . .

(ii) In the administration of any law involving the issuance of a birth certificate, each State shall require each parent to furnish to such State . . . the social security account number (or numbers, if the parent has more than one such number) issued to the parent . . . The State shall make numbers furnished under this subclause available to the Commissioner of Social Security and the agency administering the State's plan under part D of subchapter IV of this chapter in accordance with Federal or State law and regulation. Such numbers shall not be recorded on the birth certificate. A State shall not use any social security account number, obtained with respect to the issuance by the State of a birth certificate, for any purpose other than for the enforcement of child support orders in effect in the State, unless section 7(a) of the Privacy Act of 1974 does not prohibit the State from requiring the disclosure of such number, by reason of the State having adopted, before January 1, 1975, a statute or regulation requiring such disclosure.

(iii)(I) In the administration of section 9 of the Food and Nutrition Act of 2008 (7 U.S.C. 2018) involving the determination of the qualifications of applicants . . . the Secretary of Agriculture may require each applicant retail store or wholesale food concern to furnish to the Secretary of Agriculture the social security account number . . .

(II) The Secretary of Agriculture may share any information contained in any list referred to in subclause (I) with any other agency or instrumentality of the United States which otherwise has access to social security account numbers in accordance . . . only for the purpose of effective administration and enforcement of the Food and Nutrition Act of 2008 [7 U.S.C. 2011 et seq.] or for the purpose of investigation of violations of other Federal laws or enforcement of such laws.

(III) The Secretary of Agriculture . . . shall restrict . . . access to social security account numbers obtained pursuant to this clause only to officers and employees of the United States whose duties or responsibilities require access for the purposes described in subclause (II).

(IV) The Secretary of Agriculture . . . shall provide such other safeguards as the Commissioner of Social Security determines to be necessary or appropriate to protect the confidentiality of the social security account numbers.

(iv) In the administration of section 506 of the Federal Crop Insurance Act [7 U.S.C. 1506], the

Federal Crop Insurance Corporation may require each policyholder and each reinsured company to furnish to the insurer or to the Corporation the social security account number of such policyholder, subject to the requirements of this clause. No officer or employee of the Federal Crop Insurance Corporation shall have access to any such number for any purpose other than the establishment of a system of records necessary for the effective administration of such Act . . . The Secretary of Agriculture shall restrict, to the satisfaction of the Commissioner of Social Security, access to social security account numbers obtained pursuant to this clause only to officers and employees of the United States or authorized persons whose duties or responsibilities require access for the administration of the Federal Crop Insurance Act . . . shall provide such other safeguards as the Commissioner of Social Security determines to be necessary or appropriate to protect the confidentiality of such social security account numbers. . . .

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42 U.S.C. § 405(c)(2)(C)(vi):

(vi)(I) For purposes of clause (i) of this subparagraph, an agency of a State . . . administration of any general public assistance, driver's license, or motor vehicle registration law . . .

(II) Any State . . . in the administration of any driver's license or motor vehicle registration law within its jurisdiction, may not display a social security account number issued by the Commissioner of

Social Security (or any derivative of such number) on any driver's license, motor vehicle registration, or personal identification card (as defined in section 7212(a)(2) of the 9/11 Commission Implementation Act of 2004), or include, on any such license, registration, or personal identification card, a magnetic strip, bar code, or other means of communication which conveys such number (or derivative thereof).

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42 U.S.C. § 405(c)(2)(C)(viii):

(viii)(I) Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.

(II) Paragraphs (1), (2), and (3) of section 7213(a) of the Internal Revenue Code of 1986 shall apply with respect to the unauthorized willful disclosure to any person of social security account numbers and related records obtained or maintained by an authorized person pursuant to a provision of law enacted on or after October 1, 1990, in the same manner and to the same extent as such paragraphs apply with respect to unauthorized disclosures of return and return information described in such paragraphs. . . .

(III) For purposes of this clause, the term "authorized person" means an officer or employee of the

United States, an officer or employee of any State, political subdivision of a State, or agency of a State or political subdivision of a State, and any other person (or officer or employee thereof), who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990. For purposes of this subclause, the term "officer or employee" includes a former officer or employee.

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42 U.S.C. § 405(c)(2)(E):

(E)(i) It is the policy of the United States that –

(I) any State (or any political subdivision of a State) may utilize the social security account numbers issued by the Commissioner of Social Security for the additional purposes described in clause (ii) if such numbers have been collected and are otherwise utilized by such State (or political subdivision) in accordance with applicable law, and

(II) any district court of the United States may use for such additional purposes, any such social security account numbers which have been so collected and are so utilized by any State.

(ii) The additional purposes described in this clause are the following:

(I) Identifying duplicate names of individuals on master lists used for jury selection purposes.

(II) Identifying on such master lists those individuals who are ineligible to serve on a jury by reason of their conviction of a felony.

(iii) To the extent that any provision of Federal law enacted before August 15, 1994, is inconsistent with the policy set forth in clause (i), such provision shall, on and after August 15, 1994, be null, void, and of no effect.

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42 U.S.C. § 408(a)(8):

(a) In general, *Whoever* . . .

(8) discloses, uses, or compels the disclosure of the social security number of any person in violation of the laws of the United States; shall be guilty of a felony and upon conviction thereof shall be fined under Title 18 or imprisoned for not more than five years, or both.